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Published in:

Handbook of globalisation and environmental policy, Second Edition

Publication date:

2012

Document Version

Publisher's PDF, also known as Version of record

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):

Verschuuren, J. M. (2012). Overcoming the limitations of environmental law in a globalised world. In *Handbook of globalisation and environmental policy, Second Edition: National government interventions in a global arena* (pp. 616-640). Edward Elgar.

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21. Overcoming the Limitations of Environmental Law in a Globalised World

Jonathan Verschuuren

SUMMARY

Globalisation has negative side-effects on the environment, especially as a consequence of the growing opportunities for businesses to avoid strict national environmental laws by moving operations (or waste) to places in the world where strict environmental legislation either is absent or remains unenforced. National environmental laws indeed have a fundamental flaw, because they only regulate activities within the national territory of a state. There are two ways to deal with the limitations of national law. The first is to abandon national law altogether and focus on non-state law, that is, environmental norms concluded between businesses and non-governmental organisations (NGOs). The second is to improve national law. Administrative authorities as well as the legislature can stimulate and facilitate businesses and NGOs to form partnerships. The legislature can also try to extend the principle of territoriality as much as possible, for instance, by regulating the environmental performance of foreign subsidiaries of enterprises that are legally seated in a country. Slowly but surely, national courts are extending their grip on illegal activities outside national territories. Again, this process can be facilitated by the legislature, for example, by creating liberal procedural rules that allow easy access to justice and by instituting a system of legal aid that facilitates victims of environmental pollution from developing countries to sue polluters' headquarters in the developed world.

INTRODUCTION

Law still is mainly aimed at the territories of national states, with national authorities being competent to regulate only events within their national

territories. In the field of environmental policy, it has always been problematic, because environmental problems are not confined within the boundaries of single states. In the Netherlands, for example, the majority of the deposition of air pollutants such as fine particles originates across the border. At the same time, the Netherlands is a big negative contributor to the air quality abroad because of the export of bad air emitted in the Netherlands. International law and, especially, European Union (EU) law offer some help, as international legal instruments align national efforts to protect the environment. Both international and EU law, however, have to be implemented through national law and by national authorities, and thus offer only limited solutions to environmental problems caused by globalisation.

Globalisation has aggravated the situation because the extraction of raw materials, production, consumption, and waste management are increasingly globalised, in the sense that all of these activities are executed to a decreasing extent within the boundaries of a state by nationals of that state. In the recent *Probo Koala* case, for example, in which hazardous waste was illegally dumped in the African state of Ivory Coast, the waste originated from an onboard refinery process, thus avoiding environmental laws prohibiting this process, using naphtha from the US that was bought from a Mexican trading company by the multinational oil company Trafigura. This company is legally based in the Netherlands but has its headquarters in London and operates 55 additional trading companies at locations in a wide range of countries on all continents. The company chartered the Korean-built tanker vessel *Probo Koala* – owned by a Norwegian company but operated by a Greek company and sailing under Panamanian flag with a Ukrainian crew – to process the naphtha and transport the remaining waste. The vessel sailed for Amsterdam to have the waste discharged there, but after the waste was refused by the local waste disposal company because of the high level of toxicity, the ship sailed to Africa, to have the waste discharged by a small waste facility in Abidjan, Ivory Coast. That company subsequently illegally dumped the waste in several places in and around Abidjan. French authorities took the lead in the recovery and cleaning process in their former colony. In the lawsuits that followed in the various countries involved, many complicated legal issues had to be addressed and it appeared to be very difficult to redress the African victims of the pollution.

In this chapter, I will deal with the question of what the effect of globalisation is on national environmental law. Since environmental law in the EU member states is strongly influenced by EU law, I cannot ignore EU law in this chapter, but I will only touch upon it briefly because Chapter

12 by Ludwig Krämer is totally devoted to EU law. I will show that the limitations of law have led to the rise of non-state law in which national authorities play no or only a very limited role.¹ Partnerships between business corporations and environmental NGOs and ecolabels, such as the FSC label, are the most well-known examples of non-state law that truly operate on a global level. These non-state law initiatives, however, must also be applied within the context of national legal orders. Hence, the next section will discuss how national law is coping, and should cope, with non-state law. Finally, I will address the question of how official (state) law at the national level can still contribute to resolving environmental problems caused by globalisation.

BOUNDS TO NATIONAL LAW AND THE RISE OF NON-STATE LAW

Limitations of National Law

Transboundary sustainability issues are generally considered difficult to regulate under national law. One of the difficulties relates to the issue of jurisdiction. Although, in the literature, many different definitions of the term 'jurisdiction' can be found,² most authors refer to this term when they speak about 'the lawful power to make and enforce rules'.³ In international law, several principles have been developed to determine whether a state has legislative jurisdiction or 'powers to legislate in respect of the persons, property, or events in question'.⁴ The most important principles include the territoriality principle, the principle of nationality, the protective principle, the universality principle, and the passive nationality principle.⁵ It is generally acknowledged that globalisation limits the power of states to regulate:

[The] partial process of globalisation has had a number of effects. It is weakening the traditional national structures of policy making and limiting the power of national governments to control events in their own territory. The sense of authority over a particular geographic space has been diminished and in some cases lost. The word sovereignty has acquired an antique ring.⁶

¹ This part of the chapter is largely based on Bastmeijer and Verschuuren, 2005.

² Malanczuk, 1997: 109.

³ Oxman, 1997: 55.

⁴ Malanczuk, 1997: 109.

⁵ Brownlie, 1998; Molenaar, 1998; Schachter, 1991.

⁶ Browne, 2001.

While this is largely correct, one should not draw the conclusion that no options exist in national law for regulating transboundary sustainability issues. For example, other principles – in particular, the nationality principle – may provide interesting options, and it should be noted that the principles are not absolute. The exact meaning and use of the different principles depend on the legal system, and some principles are subject to continuous development. In particular, the territoriality principle has been broadened over the years.⁷ Furthermore, it is not clear whether ‘the position is that the State is free to act unless it can be shown that a restrictive rule of treaty or customary law applies to it’, or that a ‘State is entitled to exercise its jurisdiction only in pursuance of a principle or rule of international law conferring that right’.⁸ The Lotus case has been an important basis for the former opinion.⁹ It has been stated that: ‘[w]hatever the underlying conceptual approach, a State must be able to identify a sufficient nexus between itself and the object of its assertion of jurisdiction’.¹⁰ This general requirement of a sufficient link is also emphasised by other scholars: ‘It is well recognised in international law that a State cannot exercise legislative or enforcement jurisdiction unless there exists some linkage between the State and the event it acts upon’.¹¹ Based on these thoughts, the options to regulate certain transboundary sustainability issues may be more comprehensive than is generally assumed.

Nonetheless, the possibilities for national governments to subject multinational companies and international production chains to domestic legislation are not fully clear and may easily conflict with trade law and competition law as adopted within either the EU¹² or the World Trade Organization (WTO).¹³ Also the issue of supervision and enforcement raises important questions regarding the value of developing national law to address transboundary sustainability issues. Furthermore, even if the legal options to regulate transboundary sustainability issues through national law were fully clear and instruments existed for adequate supervision and enforcement, the question remains whether the responsible national authorities have the political will to use these opportunities. Governments, at least in the Western hemisphere, are less willing to address social and environmental problems as a consequence of a growing call for deregulation (i.e., less detailed, simpler, and more effective legislation) in

⁷ Orrego Vicuña, 1988: 85.

⁸ Schachter, 1991: 251; Molenaar, 1998: 80.

⁹ Schachter, 1991: 251.

¹⁰ Oxman, 1997: 55-56.

¹¹ Wolfrum, 1986.

¹² Jans and Vedder, 2008: 267.

¹³ Birnie et al., 2009: 753.

many countries.¹⁴ The deep economic crisis of 2008 only enhanced this view: environmental law is often seen as a burden, hampering the recovery of the economy.¹⁵

Limitations of International Law

Particularly in view of the limitations of national law, international law at first glance seems to be the most suitable way to address global or trans-boundary sustainability issues. Certain limitations of national law may be addressed at the international level. For example, through amendments to international and European trade legislation, the national legislator may obtain more options for regulating particular issues in relation to products. International law may also constitute the legal basis or a stimulus for national governments to adopt domestic legislation that regulates activities conducted in other states or in areas beyond state jurisdiction. The Environmental Protocol to the Antarctic Treaty of 1991 is one of the examples.¹⁶ However, international law also has its weaknesses.

In the first place, international treaties are concluded between state governments, so some of the problems with state law mentioned above occur here as well. NGOs and transnational corporations do play a role in the process leading to an international agreement, but their formal position is not strong. NGOs may affect the outcome of international environmental law-making by using their political influence at conventions.¹⁷ A hybrid NGO like IUCN even does preparatory work at international conventions, such as drafting proposals.¹⁸ Formally, however, only states can adopt binding international law. Hey showed that traditional international law is not well suited to address issues of concern to the international community as a whole that directly involve individuals and groups, such as NGOs, indigenous peoples, or transnational corporations:

Given the inter-state nature of the traditional international legal system and its focus on the shared interests of states, efforts to develop legal relationships

¹⁴ European Commission, 2001a; Mank, 1998: 4; Van Schooten and Verschuuren, 2008.

¹⁵ Verschuuren, 2010.

¹⁶ The Protocol entered into force on 14 January 1998 and established a comprehensive system of obligations and prohibitions, addressing most types of activities in the region south of 60 degrees South latitude. For a detailed discussion, see Bastmeijer, 2003.

¹⁷ Arts, 1998: 304.

¹⁸ Birnie et al., 2009: 102. The IUCN (World Conservation Union) has a hybrid character because it is a federative membership organisation with not only 787 NGO members, but also with 83 state and 117 government agency memberships (IUCN, 2011).

involving entities other than states and that seek to address community interests entail the introduction of systemic change into the existing international legal system. In other words, the inter-state nature of the current international legal system entails that that system is ill-equipped to translate social relationships that are arising as a result of globalisation into legal relationships.¹⁹

Another limitation of international law is the fact that it is becoming more and more difficult to get the international community to agree to specific legally binding rules in today's world, given the political, cultural, religious, and developmental diversity of contemporary international society. Treaties – although a more useful medium than national legislation to address global sustainability issues – either do not enter into force or apply to only a limited number of states. Especially in relation to transboundary sustainability issues, this is a severe handicap that may seriously limit the effectiveness of the international agreement concerned. For instance, even a relatively successful international law programme as the 1985 Vienna Convention for the Protection of the Ozone Layer experienced difficulties such as a reluctance of developing countries, especially the world's largest producers of chlorofluorocarbons (CFCs) (China and India) to agree to reducing ozone-depleting chemicals, as well as a reluctance of some developed countries (especially the US) to finance protective measures in developing countries or to transfer Western technologies to these countries.

Also, transboundary sustainability issues may be difficult to address through international agreements if not all states involved decide to become contracting parties. For example, it will be difficult to limit the adverse effects for the environment and people caused by multinationals if not all the states that host the individual plants of a multinational corporation or the states where the actual problems occur are willing to join.²⁰ Another example is provided by the Antarctic Treaty System: the 30 contracting parties to the Protocol on Environmental Protection to the Antarctic Treaty 'commit themselves to the comprehensive protection of the Antarctic environment' (Article 2), but legally they have no instruments to prevent governments of other states from initiating, for instance, mining activities in Antarctica.²¹

Implementation, as well as monitoring and enforcement, is another weakness of traditional international environmental law. Implementation and enforcement must be carried out by national authorities:

¹⁹ Hey, 2003: 5.

²⁰ Birnie et al., 2009: 25.

²¹ Bastmeijer, 2003.

Many, if not most treaties, do not specify how the parties to it are to give effect to it under their domestic administrative procedures and legal system. It is the end result that matters: that each party ensures that a breach does not occur within its area of responsibility.²²

Usually, the implementation and enforcement efforts of the parties are subject to review by intergovernmental commissions and meetings of treaty parties. These international institutional arrangements, however, often lack real enforcement power.²³ This is generally considered to be a serious problem, because non-compliance limits the effectiveness of legal commitments, undermines the international legal process, and can lead to conflict and instability in the international order.²⁴ Recently, things indeed seem to be changing somewhat for the better, with the adoption of enforcement mechanisms, for instance, under the Kyoto Protocol.²⁵

Finally, international law traditionally has limited possibilities to address disputes concerning the implementation of treaties. In regular international law, there are usually either special tribunals, such as the International Tribunal for the Law of the Sea (ITLOS), or the universal International Court of Justice that can be addressed. However, these institutions are only competent to resolve disputes between states insofar as the states concerned explicitly accepted the jurisdiction of the institutions. Other interested parties, such as NGOs or corporations, let alone interested citizens, cannot appeal to these institutions. They do, however, play an important role in the background, identifying non-compliance or other problems.²⁶ The establishment of an international environmental court to which others than states can address has been proposed by many,²⁷ yet still seems to be a distant illusion.

The limitations of international law discussed above are not absolute. In recent years, many initiatives have been taken to find solutions and to improve the effectiveness of international environmental agreements. For example, Freestone mentions various instruments that are applied to improve the implementation process at the domestic level, such as capacity building, financial support, and the use of other non-binding instruments.²⁸ However, it should be also noted that the recognition of the complexity of sustainability issues has grown: attention is more and more

²² Bush, 1991: 34.

²³ Birnie et al., 2009: 213.

²⁴ Sands, 2003: 172.

²⁵ Birnie et al., 2009: 250.

²⁶ Sands, 2003: 112 and 195.

²⁷ Hey, 2000.

²⁸ Freestone, 1999.

focused on the protection of entire ecosystems and improving the sustainability of complete production chains.²⁹ Although there are examples of international environmental agreements that are based on these more comprehensive approaches,³⁰ it is clear that the difficulties discussed above may constitute serious blockades against achieving effective international environmental agreements on these issues.

The Rise of Non-State Law

Since the late 1980s, non-state law has risen as a response to globalisation.³¹ As non-state law is not necessarily restrained by national borders, it is supposed to be better suited to address the problems connected with globalisation. Non-state law is an ill-defined term that is used to indicate a wide range of self-regulatory and soft-law instruments (such as guidelines, codes, handbooks, etc.), aimed at issues of public interest that can, in principle, be governed by 'official' law as well. Such 'non-state law' is generated by a whole range of very different non-state actors: business organisations, groups of individual companies, NGOs, or other non-profit organisations. They also operate in combination, sometimes even with some government involvement – in which case it is usually referred to as 'co-regulation'. The rapid growth of non-state law can be observed not only at the national level but also at the regional (for instance, European) level and the international level. The latter is relevant not only for international and supranational institutions, including EU institutions, but also for the national state legislature, both directly and indirectly (through its involvement in international and EU law). As stated above, in many policy fields (including environmental policy), the international or regional level cannot be clearly distinguished from the national level.

Besides the already mentioned advantage of non-state law over official (state) law in case of regulation of unwanted side-effects of globalisation, non-state law has several other advantages as well. Most importantly, since the people who develop, apply, and enforce the rules are the same as those bound by them, these people are more committed to them than to state rules. In addition, non-state rules are better known to the regulated, easier to understand, more flexible (in the sense that they can be changed more easily than official state rules), and so, in general, more effective.

²⁹ Birnie et al., 2009: 5-6.

³⁰ For example, the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR); see Birnie et al., 2009: 592.

³¹ Hertogh, 2008: 18.

In the field of the environment, government regulators have been losing their powers and resources too, while NGOs, often together with individual corporations, commercial third parties, business groups, and the financial sector, have begun to fill the regulatory gap.³² Non-state law indeed plays an important role in addressing unwanted negative effects of globalisation on the environment. It is often used to steer multinational corporations towards a more sustainable way of doing business. Multinationals can be 'self-disciplined' through collaborative approaches, either in international business organisations or in bilateral or multilateral initiatives involving NGOs ('partnerships'). The latter type of self-regulation has the advantage that NGOs offer a countervailing power to mighty transnational business corporations. In the (sharp) words of Falk: 'There is nothing in the history of business operations to suggest that the long-term public good can be safely entrusted to those whose priority is short-term profits'.³³ From the perspective of transnational corporations, cooperative action can be used to legitimise their actions at a time when government approval alone is no longer considered to be sufficient for demonstrating adequate sustainable performance.³⁴ Also, NGOs can sometimes provide corporations with social, ecological, scientific, and legal expertise, and help corporations build social networks with other stakeholders.³⁵

In partnerships, multinationals and NGOs together set new standards and implement them. They monitor and enforce both existing international law and new standards without government or state intervention. They sometimes even arrange for arbitration or other ways of dispute settlement. Traditionally, all of these elements of the 'regulatory chain' have been considered to belong to the domain of national or international authorities. Below, I will elaborate these four elements of the regulatory chain, using the Marine Stewardship Council (MSC) and the Forest Stewardship Council (FSC), perhaps the best-known examples of business-NGO collaborations, as illustrations.³⁶

Norm-Setting

Sustainability standards can be set within industry or business organisations alone³⁷ and in business-NGO collaboration projects. As argued

³² Gunningham, 2008: 110.

³³ Falk, 1996: 17.

³⁴ Grolin, 1998: 220.

³⁵ Stafford et al., 2000: 123.

³⁶ The MSC has its headquarters in London (MSC, 2011a), the FSC in Bonn (FSC, 2011a). See also the contribution by Pieter Glasbergen in this volume.

³⁷ Roht-Arriaza, 1995.

above, the latter is preferable because of its greater legitimacy. Important examples in the field of environmental policy of such norms are those that are the basis of the FSC and the MSC.

The FSC, founded in 1993 by environmental groups and the timber industry, is basically a certification system. Products from, and traceable to, certified forests are entitled to carry the FSC logo. Companies seeking to use this logo must receive certification of a 'chain of custody' from primary production through retail sale: therefore, every wood product must always be traceable to a particular certified forest. The certification system is based on 'principles' and 'criteria' intended to clarify the application of these principles. These principles and criteria set norms on how to manage forests and forest operations sustainably.³⁸ One of the principles, for instance, states that biological diversity is to be conserved, as well as its associated values, water resources, soils, and unique and fragile ecosystems and landscapes, and by so doing, the ecological functions and the integrity of the forest are to be maintained (principle 6). This principle has been elaborated in several criteria. For instance, one criterion states that rare, threatened, and endangered species and their habitats (e.g., nesting and feeding areas) must be protected; that conservation zones and protection areas must be established, appropriate to the scale and intensity of forest management and the uniqueness of the affected resources; and that inappropriate hunting, fishing, trapping, and collecting must be controlled. Establishing the FSC was a reaction to the failure of governments to reach agreements, for example, on the introduction of a government-run certification system, within the International Tropical Timber Organization (ITTO).³⁹ To date, there is no binding international law regarding the protection of tropical forests.⁴⁰ The FSC rapidly grew into an organisation with more than 500 members, including representatives of environmental and social groups, the timber trade and forestry profession, indigenous people's organisations, community forestry groups, and forest product certification organisations from around the world. Government organisations are denied membership.

³⁸ Meidinger, 2000: 130.

³⁹ Meidinger, 2000: 131.

⁴⁰ Only 'soft law' exists, such as the Authoritative Statement of Forest Principles, adopted during the 1992 UN Conference on Environment and Development in Rio de Janeiro. This document not only has a very weak legal status, but its meagre content also received much criticism: NGOs have called the statement a 'chain saw charter'. The legally binding Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) is increasingly used to list endangered species of trees, thus to regulate trade in tropical wood products.

The MSC, modelled on the FSC, was founded in 1997 by Unilever, one of the world's largest buyers of fish, and the World Wide Fund for Nature (WWF), one of the world's largest environmental organisations, to ensure the long-term viability of the global fish populations. The thrust was to devise incentives for all stakeholders to work toward the goal of sustainable fisheries.⁴¹ Again, principles and criteria – such as the internationally endorsed precautionary principle – constitute the basis for an accreditation and certification system. The MSC now has links to hundreds of major seafood processors, traders, and retailers around the world. The difference with the FSC is, however, that in this case a large body of binding international law exists. An example is the UN Convention on the Law of the Seas (UNCLOS), which consists of rules on fisheries and the protection of the living resources of the high seas, some of which have been worked out in the recent Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.⁴²

Implementation

Implementation of the norms that have been agreed upon seems to be less of a problem as far as multistakeholder approaches are concerned than the implementation of traditional international law. Taking the FSC as an example, the organisation evaluates, using fixed procedures and standards, which bodies are able to provide certification. In this accreditation process, it is decided which organisations are allowed to carry out the certification scheme and evaluate forests. The (regular) certification organisations, therefore, implement the FSC scheme. At the same time, the NGO members of the FSC actively stimulate demand for FSC products (by advertising, by establishing groups of retailers and product dealers committed to FSC products, and by persuading retailers to carry FSC products).

Multistakeholder agreements can also stimulate the implementation of traditional international environmental law. For instance, one of the principles of the MSC states that fisheries management systems should respect local, national, and international laws and standards.

⁴¹ Constance and Bonanno, 2000: 130.

⁴² This Agreement entered into force on 11 December 2001. All UNCLOS documents are available at the UNCLOS secretariat website (UNCLOS, 2011).

Monitoring and Enforcement

As stated above, the monitoring and enforcement of international environmental law is usually regarded as problematic, to put it mildly. Because of the inherent weakness of the public enforcement of international law, NGOs traditionally played an important role in monitoring and enforcing international law, either in collaboration with governments through special monitoring organisations such as TRAFFIC, initiated by the WWF and IUCN to monitor the Convention on International Trade in Endangered Species,⁴³ or by exposing illegal conduct or even confiscating illegal fishing gear on the high seas.⁴⁴ The European Commission has recognised this role of NGOs, and is looking for methods to facilitate NGOs fulfilling this role further. In its 6th Environmental Action Programme, the Commission states that: 'NGOs have an important role to play . . . in monitoring the implementation of legislation'.⁴⁵

Monitoring and enforcing multistakeholder agreements like the FSC and the MSC is a logical part of the certification process. Not only is the work of the certifier peer-reviewed before a certificate is actually issued, but the certificate is also subject to the minimum requirement of annual monitoring by the certifiers. Certifiers have the right to conduct irregularly timed, short-notice inspections. This is stated in contractual agreements between the certification body and the recipient company. In the case of non-compliance, additional conditions can be included in these agreements or the certificate can be withdrawn.⁴⁶

Dispute Resolution

Resolving disputes concerning the implementation of norms governed by multistakeholder agreements has long been neglected. Several of the NGO-multinational corporation arrangements did provide for objection procedures, but a full dispute resolution arrangement is usually missing. However, things are changing rapidly. For instance, the FSC now has a Dispute Resolution and Accreditation Appeals Committee.⁴⁷

Partnerships like the FSC organisation for sustainably produced wood products can thus take care of all the steps in the regulatory process that

⁴³ Braithwaite and Drahos, 2000: 574.

⁴⁴ Greenpeace, 2008.

⁴⁵ European Commission, 2001b: 62.

⁴⁶ See, for instance, the MSC standards and methods (MSC, 2011b).

⁴⁷ See Articles 72-76 of the FSC by-laws (FSC, 2011b).

are normally taken care of by the state: from norm setting to implementation and enforcement, and even dispute settlement.

HOW SHOULD NATIONAL LAW DEAL WITH SUCH PRIVATE INITIATIVES?

The rise of non-state law in the field of the environment has not led to a total retreat of state law. Instead, the state: 'almost invariably retains a supporting role, underpinning alternative solutions and providing a back-drop without which other, more flexible options, would lack credibility, and stepping in where they fail'.⁴⁸ Instead of devising command-and-control instruments, the state seeks to encourage and reward enterprises for going beyond compliance with existing regulation and, generally, adopt a cooperative approach. Although this development clearly has not come to an end yet, and 'regulatory reconfiguration' is still in full swing, specific suggestions for state regulators and politicians have been made. State regulators should:⁴⁹

- harness the capacities of second and third parties (such as corporations and NGOs, respectively) to develop non-state law more effectively;
- empower the institutions of civil society to make corporations more accountable, for instance, through informational regulation;
- strengthen the capability of enterprises for internal reflection and self-control, for instance, through focusing more on process-based strategies such as environmental management systems;
- facilitate partnerships between NGOs and industry;
- encourage and reward environmental leaders, and shame laggards;
- encourage best practice, rather than merely impose minimum standards and compliance.

It must be acknowledged, though, that there are not many experiences with such a new regulatory approach, and there is some well-founded criticism as well. Research on partnerships, such as the Forest Stewardship, for example, shows that certification bodies back different styles of forest management, including styles that seem to conflict with the FSC standards.⁵⁰ In general, it has been concluded that most of the

⁴⁸ Gunningham, 2008: 111.

⁴⁹ Gunningham, 2008.

⁵⁰ Maletz and Tysiachniouk, 2009: 427.

certified forests are managed using less stringent schemes, the market for sustainable timber is still a niche market, and the exact origin of the majority of the timber and paper traded in the international market is still unknown.⁵¹ Industry-dominated standards organisations seem to merely aim at justifying a business-as-usual situation and avoid building the capacity and commitment to be responsive to environmental and social groups.⁵² Furthermore, there is some research that seems to indicate that the single most important motivator of improved environmental performance are technological changes mandated by official environmental regulation.⁵³ We must, therefore, conclude that non-state law will always operate within the context of command-and-control type of regulation by the state.

REMAINING POSSIBILITIES FOR TRADITIONAL LEGAL ACTION

The Legislature

Until now, legislators have not been very active in this field. The probably most far-reaching bill trying to regulate the environmental performance of companies which operate abroad has been the Australian Corporate Code of Conduct Bill 2000. This bill, which never passed Parliament, is an interesting example of extraterritorial legislation. It required Australian companies employing more than 100 persons in a foreign country to meet basic environmental standards laid down in Section 7 (BOX 21.1).

A comparable example is the NGO-led 2003 Corporate Responsibility Bill in the United Kingdom (UK), which even had a provision on the payment of damages to people harmed by the companies' overseas activities. Like the Australian bill, this bill did not gain sufficient political support. In 2010, a private Member of Parliament's bill aimed at setting corporate social responsibility standards for Canadian mining companies operating abroad was defeated in the Canadian House of Commons.

People being harmed because of environmental damage caused by companies' activities abroad, for instance in a developing country, have under EU law the option to base their claim on the law of the EU member state in which the corporation to be sued is incorporated. This has been laid down in the Regulation on the law applicable to non-contractual

⁵¹ Visseren-Hamakers and Glasbergen, 2007: 417.

⁵² Gulbrandsen, 2008: 579.

⁵³ Gunningham et al., 2003.

Box 21.1 Section 7 environmental standards

- (1) An overseas corporation which undertakes any activity in a place must take all reasonable measures to prevent any material adverse effect on the environment in and around that place from that activity.
- (2) Without limiting subsection (1), an overseas corporation must:
 - (a) at least once in every period of 12 months, collect and evaluate information regarding the environmental impacts of its activities; and
 - (b) establish objectives for the measurement of its environmental performance; and
 - (c) monitor and assess its compliance with those objectives; and
 - (d) provide timely information to its employees and to members of the public in any place in which it undertakes activities on the actual and potential environmental impacts of the activities of the corporation; and
 - (e) have appropriate policies on matters of environmental safety, including (where applicable) the handling of hazardous materials and the prevention and control of environmental accidents; and
 - (f) undertake environmental impact assessments of all new developments, including providing an opportunity for public comment on the assessment; and
 - (g) have regard to the precautionary principle in carrying out the actions mentioned in paragraphs (a) to (f).

obligations ('Rome II'), which entered into force in 2009.⁵⁴ This regulation is unique in that it has a universal scope. In Article 7, it states that the person seeking compensation for environmental damage may choose to base his or her claim on the law of the country in which the event giving rise to the damage occurred, rather than on the law of the country in which the damage occurred (as normally would be the case). This provision thus may help people from countries with weak environmental legislation, such as many developing countries, if they want to sue the parent company for damages caused by local subsidiaries' activities. However, several hurdles then have to be faced. First of all, jurisdiction has to be established by the court that is addressed. In the next section, I will show that there are several courts that claim jurisdiction in cases against both the parent company and the subsidiary, even though the subsidiary is based in another country. Secondly, once jurisdiction is established, claimants have to show that the event giving rise to the damage occurred in the state where the court is located. Until now, case law usually requires a strict link, in the sense that the actual pollution has to emerge from the territory of the EU

⁵⁴ European Council, 2007.

member state in which the court is located. This will not always be easy to prove, as will be clear from the cases described below.

The Judiciary

In several countries, courts are opening up possibilities to claim compensation from companies for environmental damage caused abroad. This is an interesting development, as – under the general principles of international law – states cannot legislate for a third country. Courts, through international private law, actually are doing just that: extraterritorially applying the national laws of one state to activities in another state. One of the first cases in this respect was the *Ok Tedi* case, in which 30,000 Papua New Guinean landowners successfully sued the Australian company BHP before an Australian court for the pollution of river systems and adjoining land by the company's copper mine in Papua New Guinea. The case was settled out of court in 1996.⁵⁵ One of the latest cases is a 2010 Norwegian Supreme Court decision in which the Danish parent company Hempel was held liable for costs involved with pollution caused by a Norwegian subsidiary and even that of the subsidiary's predecessor in Norway.⁵⁶ Similarly, a Dutch court ruled in 2010 the claim admissible of a Nigerian citizen, together with a Dutch environmental NGO, against both the parent company Royal Dutch Shell and its subsidiary Shell Petroleum Development Company Nigeria for damage as a consequence of oil spills near the village of Goi in Nigeria. Even though the damage is suffered by a Nigerian villager and is caused by a Nigerian company, the claim is admissible because of its connectedness to the claim against the Dutch parent company.⁵⁷ I will now focus on the legal issues that are at stake in cases like these, by analysing one recent case in more detail: the *Trafigura* case.⁵⁸

Trafigura Case

In 2006, the multinational trading company Trafigura, which is legally based in the Netherlands (as a Dutch legal entity) but is headquartered in London and operates 55 additional trading companies at locations in a wide range of countries on all continents, chartered the tanker vessel

⁵⁵ The settlement only proved to be a temporary victory: polluting activities continued, as did the legal battle. For reasons of space I will not deal with the subsequent events.

⁵⁶ See in more detail, Sjøfjell, 2010.

⁵⁷ District Court of The Hague (2010).

⁵⁸ This section is an abbreviated and updated version of parts of Verschuuren and Kuchta, 2010. See that chapter for more references.

Probo Koala to transport oil products. This Korean-built carrier is owned by a Norwegian company but operated by a Greek company, and it sails under Panamanian flag. In June 2006, Trafigura contacted the waste facility of Amsterdam Port Services (APS) in the Netherlands to take a chemical waste product called 'slops', which is regular waste from oil tankers. APS agreed to do so, charging Trafigura 12,000 euros. During the transfer of this waste in Amsterdam, APS noted an abnormal smell and found that the waste was 250 times as polluted as normal slops. The company then refused to take the rest of the waste and informed Trafigura to contact another Dutch company that was suited to receive this kind of toxic waste. Trafigura refused to do so because of the costs involved – apparently this would have cost 500,000 euros. Instead, the company wanted to take back all the waste.

After having noticed the abnormal smell, APS immediately notified the municipal environmental authorities. They requested the port authorities to allow them to return the waste, which later turned out to be waste of an onboard cleaning process of polluted naphtha, into the ship to be transferred to a facility that is suited to take this kind of polluted waste. Trafigura bought the naphtha in the United States, through a Mexican trading company with the intention to clean ('wash') the naphtha so that it could be used as a blend stock for petrol. At first, the naphtha was transported to Tunisia to be washed there. Caustic washes like this had been banned by most countries because of the hazardous waste that remains after the washing process and because of the absence of facilities prepared to take that waste. After the Tunisian company, for the same reason, stopped washing naphtha for Trafigura, it was decided to do the washing at sea, onboard the *Probo Koala*.⁵⁹

The municipal environmental authorities were hesitant about what to do: let the ship go or hold it in Amsterdam for further investigations? They got in touch with the national environmental inspectorate for advice, mainly to find a financial solution for the additional costs involved. Meanwhile, the port authorities, after having consulted with Port State Control of the National Transport and Water Management Inspectorate, allowed APS to return the slops into the tanker. Port State Control reported to the Amsterdam Port authorities that there was no legal basis, as far as international maritime law was concerned (i.e., the MARPOL convention: the International Convention for the Prevention of Pollution from ships), to prohibit the return of the slops into the ship.

⁵⁹ Further details can be found in the verdict of the District Court of Amsterdam (2010a) in the criminal case against the employee of Trafigura who was leading the washing process (see below).

However, the municipal environmental authorities decided to prohibit APS from returning the waste because they suspected offences against national environmental law. Consequently, they reported this to the criminal authorities. The Public Prosecutor's Office started an investigation against the *Probo Koala* and took a sample of the slops. It did not chain up the vessel, although it had the power to do so. All of this happened in the span of only three days. While the municipal and national environmental authorities were still discussing the situation and the Public Prosecutor's Office was still investigating the case, the slops were pumped back by APS following permission granted by the Amsterdam Port authorities. Immediately thereafter, the vessel departed for the open sea.

After leaving European waters, the *Probo Koala* sailed to Abidjan in Ivory Coast. The slops were discharged at a local waste disposal company, called Compagnie Tommy. This company had only been in possession of a permit to take waste from ships for one month. It charged Trafigura only about 1,200 euros. Both the company and the authorities were notified by the Dutch authorities on the toxicity of the slops, apparently before the dumping took place. Local authorities started an investigation, but they permitted the ship to leave for Europe. During the following night, a total amount of 500 tons of chemical waste was dumped at ten locations near the Ivory Coast capital of Abidjan, with 5 million inhabitants, within short distances of each other, allegedly leading to the death of eight or ten people.⁶⁰ It was reported that 44,000 people had sought medical assistance, while 9,000 were accounted for as actually being sick from the waste disposal. A Resolution by the European Parliament spoke of 85,000 people treated in hospitals because of nose bleeding, diarrhea, nausea, irritated eyes, and breathing problems.⁶¹ According to the United Nations Children's (Emergency) Fund (UNICEF), between 9,000 and 23,000 children needed medical assistance and health care. The victims suffered from respiratory problems, burns and irritation of skin and eyes, nausea, dizziness, and vomiting (including throwing up blood). There were reports of displaced people, closed schools in affected areas, closed industries, and laid-off workers. Fishing activities and vegetable and small livestock farming were reported to have stopped. In addition, water sources as well as food chains were reportedly contaminated, resulting in contaminated

⁶⁰ Reports on the number of casualties differ a lot. Later reports question such severe health effects of the pollution.

⁶¹ European Council, 2006. The UN mission in Ivory Coast (ONUCI) even reports that between 100,000 and 150,000 people have been treated in hospitals in Abidjan following the dumping of the waste, see ONUCI, 2007: 24.

food products. The city's household waste treatment centre had to be closed down for two months.⁶²

This is clearly a case that shows the negative side-effects of globalisation. How have courts, thus far, dealt with the various cases that were brought to their attention following the illegal dumping of waste? There have been court cases in Ivory Coast, the UK, and the Netherlands. In Ivory Coast, soon after the waste had been dumped, Ivorian authorities arrested the directors of both the waste disposal company Compagnie Tommy and the vessel's agent in Abidjan, as well as the director of a company that is 100 per cent owned by Trafigura and that has a local office in Abidjan. In October 2008, the owner of Tommy was sentenced to 20 years of imprisonment and his shipping agent to five years. Criminal and civil-law cases against Abidjan-based officials of Trafigura that had been initiated were not pursued after Trafigura and the Ivorian authorities reached a settlement of the case for 152 million euros in 2007. The deal absolved the Ivorian government and Trafigura of any liability and prohibited future prosecutions or claims by the Ivory Coast government on Trafigura. Although the deal was heavily criticised, the Ivorian Court of Appeal ruled, in March 2008, that criminal charges could not be pursued against Trafigura.

In the UK, proceedings started in May 2009 before the London High Court. In what was the biggest class action ever brought before British courts, 30,000 victims lodged a claim against Trafigura. The court accepted jurisdiction in this case because of Trafigura's headquarters in the UK. Around the same time, BBC's *Newsnight* and a Dutch newspaper disclosed a confidential report by the Netherlands Forensic Institute which showed that an analysis of the samples that were taken from the vessel in Amsterdam in 2006 demonstrated that the *Probo Koala* at that time was shipping 2,600 litres of a substance containing high levels of the extremely toxic hydrogen sulphide. This report contradicted Trafigura's statements that the *Probo Koala* was not carrying substances with serious health implications. Following the disclosure of the report, the proceedings in London, which started that same week, were immediately adjourned until October 2009. Trafigura responded to the BBC report by suing BBC's *Newsnight* programme for libel. In September 2009, a

⁶² The above description of the facts is based upon a wide variety of sources, mostly reports by investigating commissions that were instituted after the incident, including CIEDT/DA, 2007; ONUCI, 2007; UNEP, 2007a: 6-9; UNEP, 2007b; Hulshof Commission, 2006; De Brauw, Blackstone, & Westbroek, 2007. Although these sources may be somewhat contradictory on some of the facts, the above description is thought to be as accurate as possible.

settlement was reached: Trafigura agreed to pay 1,000 UK pounds(UKP) to each of the 30,000 claimants. In a joint statement, Trafigura and the law firm representing the Ivorians stated that independent experts so far have been unable to identify a link between exposure to the chemicals and severe health problems.

In the Netherlands, the criminal investigations against Trafigura were intensified and additional investigations were started against the various authorities involved, as well as against APS, after Greenpeace filed charges against Trafigura, APS, and officials of the municipal environmental authorities. In February 2007, two directors of the Dutch waste disposal service APS were arrested. Furthermore, the Dutch criminal authorities ordered the arrest of the Ukrainian captain of the *Probo Koala*. In May 2007, the same authorities decided to prosecute the chief executive officer (CEO) of Trafigura as well. The investigations progressed slowly because of the complexity of the case and because of the fact that relevant information rested with a series of different companies and authorities in several countries. In June 2008, a Dutch court ruled that the CEO of Trafigura should be acquitted because there was no link between his personal actions and the dumping of the waste. Although a higher court reaffirmed this ruling in December 2008, the Dutch Supreme Court declared that decision invalid in 2010 and referred the case back to the higher court for final sentencing. The case against the other defendants was decided in July 2010.⁶³

The Dutch company Trafigura was sentenced to a fine of 1 million euros for the illegal export of waste to Ivory Coast, infringing the EU Regulation on the shipment of waste, which explicitly prohibits the export of waste from the EU to Africa. The Trafigura employee who was leading the onboard treatment of naphtha as well as the discharge of the waste in Amsterdam got a suspended sentence of six months of imprisonment and a fine of 25,000 euros for concealing the hazards while delivering hazardous substances to others. The Ukrainian captain of the *Probo Koala* was sentenced to a suspended imprisonment of five months for the same crime, as well as for fraud. The director of APS was found guilty of infringing Dutch environmental legislation. However, he was acquitted because he rightfully trusted the municipal environmental authorities, allowing him to have the waste pumped back into the ship. The case against the municipal environmental authorities was declared inadmissible because, under Dutch law, governmental authorities cannot be prosecuted for their actions.

Besides these criminal proceedings, a tort action was filed as well in the Netherlands. On behalf of more than 1,000 of the Ivorian victims,

⁶³ District Court of Amsterdam, 2010a, 2010b, 2010c, 2010d, 2010e.

a Dutch law firm initiated tort proceedings against Trafigura, the city of Amsterdam, and the Dutch State. Independently from that, Dutch national and municipal (Amsterdam) authorities offered 1 million euros to the United Nations Environment Programme (UNEP) trust fund to relieve the needs of the victims. In 2008, however, the law firm ceased all activities because of financial constraints: the Ivorian claimants could not apply for legal aid because most of them did not have a passport. Hence, the Dutch Ministry of Justice was unwilling to grant them free legal aid. Since, under Dutch law, it is not allowed for a law firm to negotiate with the client to transfer a part of the award of the case, there were no funds to cover the huge costs involved in a complicated case like this. As stated above, the UK tort case was more successful. Unlike the Netherlands, in the UK it is possible to claim all the costs of a law firm makes in a case like this.

The above description of the Dutch cases shows that here a rather national legal approach is followed. Only illegal actions that took place in the Netherlands have been prosecuted. Although this is not without effect, for an outsider it seems a bit strange that the court dealt neither with the actual dumping of waste in Ivory Coast nor with its consequences. Trafigura was only prosecuted for infringing Dutch law on Dutch territory. The tort case was only successful in the UK because of liberal procedural rules, allowing for class actions of overseas victims against UK-based corporations.

CONCLUSION

This chapter has focused on the negative side-effects of globalisation, especially the growing opportunities for businesses to avoid strict national environmental laws by moving operations (or waste) to places in the world where environmental norms are either absent or unenforced. National environmental laws indeed have a fundamental flaw because they basically only regulate activities within the national territory of that state. International environmental law does offer some help because environmental treaties have norms that are agreed upon by more than one state. Treaties, however, are never concluded between all states of the world, nor are they always enforced well. In addition, the implementation and enforcement of environmental treaties have to take place predominantly within a national legal context, by national institutions using national legal instruments.

There are two ways to deal with the limitations of national law. The first is to abandon national law altogether and focus on non-state law,

i.e., environmental agreements concluded between businesses and NGOs. I have shown above that the FSC label for sustainably produced wood products is an interesting example of non-state law, where the FSC organisation takes care of all the steps in the regulatory process that are normally taken care of by the state: from norm setting to implementation and enforcement, and even dispute settlement.

The second way to deal with the limitations of national law is to improve national law. Administrative authorities as well as the legislature come to mind as the most important actors who have to step in. There are several things that they can do to stimulate and facilitate businesses and NGOs to form partnerships like the ones I have described. They should harness the capacities of corporations and NGOs to develop non-state law effectively, empower the institutions of civil society to make corporations more accountable (for instance, through informational regulation) and strengthen the capability of enterprises for internal reflection and self-control (for instance, by focusing more on process-based strategies such as environmental management systems). In addition, the authorities can encourage and reward environmental leaders, shame laggards, and encourage best practices, rather than merely enforce minimum standards and compliance.

The legislature can also try to extend the principle of territoriality as much as possible, for instance, by regulating the foreign environmental performance of the enterprises that are legally seated in a country. There have been a few attempts to do so, but apparently political will is still lacking here. Obviously, there are many hurdles to face in such an approach, for instance, the hurdle that the authorities have no legal power to do inspections in another country, unless special agreements have been concluded between the countries involved.

Developments are also taking place within the judiciary. Slowly but surely, national courts are extending their grip on illegal activities outside their national territories. Again, this process can be facilitated by the legislature, for instance, by creating liberal procedural rules and instituting a system of legal aid that facilitates victims of environmental pollution from developing countries to sue polluters' headquarters in the developed world.

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